

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

BENNIE KYLE,

Petitioner,

v.

CRIMINAL ACTION NO. 1:15CR107
CIVIL ACTION NO. 1:16CV183
(Judge Keeley)

UNITED STATES OF AMERICA,

Respondent.

ORDER ADOPTING MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION [DKT. NO. 4]

After being sentenced by the Court on July 16, 2016 (Criminal No. 1:15cr107), the petitioner, Bennie Kyle ("Kyle"), filed a pro se petition styled "Writ for Habeas Corpus" that the Clerk docketed as one under 28 U.S.C. § 2241 (Civil No. 5:16cv116, Dkt. No. 1). Pursuant to Local Rule of Civil Procedure 72.01, the matter was referred to the Honorable Robert W. Trumble, Magistrate Judge, for initial review. Upon reviewing the petition, Magistrate Judge Trumble concluded that it should be recharacterized as a petition under 28 U.S.C. § 2255 because it challenges Kyle's federal sentence (Civil No. 5:16cv116, Dkt. No. 3). Magistrate Judge Trumble sent Kyle proper notice of the Court's intention to so characterize his petition and gave him twenty (20) days in which to object. Id. When Kyle did not respond to the notice, the Honorable Frederick P. Stamp, Jr., District Judge, directed the Clerk to close Kyle's § 2241 habeas case and reopen it as a § 2255 habeas

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case associated with the criminal case in which he was sentenced (Civil No. 5:16cv116, Dkt. No. 7).

On September 13, 2016, using Kyle's petition, the Clerk opened this § 2255 habeas case (Dkt. No. 1). In a Report and Recommendation (R&R) dated September 14, 2016, Magistrate Judge Trumble recommended that the petition be dismissed as premature because an appeal is pending in Kyle's criminal case (Dkt. No. 4). Kyle received the R&R on September 19, 2016 (Dkt. No. 5). In the R&R, Magistrate Judge Trumble notified Kyle of his right to file any objections to the recommendations within fourteen (14) days following his receipt of the R&R. See 28 U.S.C. § 636(b)(1)(C). To date, Kyle has not filed any objections.

This Court is required to review de novo only those portions of the magistrate judge's findings to which objection is made. Id. "[T]he Court may adopt, without explanation, any of the magistrate judge's recommendations to which the prisoner does not object." Dellarcirprete v. Gutierrez, 479 F. Supp. 2d 600, 603-04 (N.D.W. Va. 2007) (citing Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983)). Because Kyle has not filed any objections, the Court's review of the R&R is for clear error.

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Upon review of the R&R and the record, the Court adopts the opinion of the Magistrate Judge for the reasons discussed in the R&R (Dkt. No. 4). Therefore, the Court:

1. **ADOPTS** the R&R (Dkt. No. 4) and
2. **DISMISSES** this civil action **WITHOUT PREJUDICE as premature** and **ORDERS** that it be **STRICKEN** from the active docket of this Court.

It is so **ORDERED**.

The Court **DIRECTS** the Clerk to enter a separate judgment order and to transmit copies of both orders to counsel of record and to the pro se plaintiff by certified mail, return receipt requested.

DATED: October 19, 2016.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE